Supreme Court, U.S.
FILED
05-17 APR 19 2005
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DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

United States

Respondent

v.

Pedro Jose Hernandez, a/k/a Juan Pedro, a/k/a Pedro Jose

Petitioner

On Petition For Writ Of Certiorari
To The
United States Court Of Appeals For The First Circuit

Petition For Writ Of Certiorari

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Question Presented:

Whether Pedro Jose Hernandez's sentence should be remanded for reconsideration in light of this Court's ruling in United States v. Booker?

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Petition for a Writ of Certiorari

Petitioner, Pedro Jose Hernandez, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case. As a result of this court's recent ruling in United States v. Booker; 125 S. Ct. 738; 160 L.Ed. 2d 621, the Federal Sentencing Guidelines have been held to be discretionary with respect to sentencing judges. In the case at bar, Judge Lasker indicated that he would have reached a different result had he not been bound by them. Therefore the judgment in this case is reviewed in light of this Court's recent decision that the guidelines are advisory and not mandatory.

Opinions Below

The opinion of the First Circuit Court of Appeals has not been reported. The opinion of the United States District Court for the District of Massachusetts court has not been reported.[1]

Statement of Jurisdiction

The judgment in this case was first entered by the United States District Court for the District of Massachusetts on August 29, 2002. An appeal was filed with the United States Court of Appeals for the First Circuit pursuant to its appellate jurisdiction under 28 U.S.C. §1291. A brief on appeal was filed pursuant to Anders v California, 386 U.S. 738, (1967) The court remanded the case to the United States District Court pursuant to U.S. v Melendez-Santana, 353 F3d 93, (2003) Judgment entered on January 19, 2005. Final

[1] Copies of both judgments are included in the appendix to this petition.

Judgment entered on January 19, 2005. This case now falls within the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in this case are as follows:

1) 21 U.S.C. § 963 which provides that: "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

2) 18 U.S.C. § 3553 (a) and (b). Pursuant to Supreme Court Rule 14(f) please see Appendix for full text.

3) 18 U.S.C. § 3742(e). Pursuant to Supreme Court Rule 14(f) please see Appendix for full text.

Statement of the Case

This case was prosecuted in the United States District Court for the District of Massachusetts. The appellate record is drawn from the Transcripts of the plea and sentencing hearings as well as motions and pleadings docketed in the District Court. [2] U.S. v. Yates, 973 F.2d 1 (1st Cir.1993).

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[2] References to the Sentencing Transcript are hereinafter referred to as "ST", followed by the page and line number. The transcript is included in the accompanying Appendix.

Pedro Jose Hernandez (Defendant at trial level, hereinafter "Petitioner") was convicted of: One count of Conspiracy to Import Heroin (21 U.S.C. § 963).

The appellant in the case at bar tendered a change of plea on November 27, 2001. This hearing was subsequent to two status hearings and a detention hearing during which the consequences of a tender of plea were discussed. The defendant, by and through his attorney, requested a Pre Sentence Investigation report, which was produced. The final change of plea hearing was held before Judge Lasker on November 27, 2001.

A final plea colloquy was held pursuant to Federal Rules of Criminal Procedure, Rule 11, and Mr. Hernandez was informed by the court of the consequences of his tender and the benefits he received in return for his waivers. Mr. Hernandez and his counsel conferred and Mr. Hernandez indicated that he understood and accepted the terms and conditions of his tender.

The sentencing Judge, Morris E. Lasker, sentenced Mr. Hernandez to 100 months imprisonment. (ST page 16). However, at numerous times during the sentencing hearing Judge Lasker indicated that he felt constrained by the Federal Sentencing Guidelines despite facts and circumstances of the case including the fact that despite only being peripherally involved, Mr. Hernandez was a "career offender" and had to be treated as such under the Guidelines. (ST page 11, lines 15-18; page 12, lines 6-10; page 15, line 15 to page 16, line 12.) The judgment was entered on August 29, 2002.

A Notice of Appeal was then filed with the United States Court of Appeals for the First Circuit on September 4, 2002. A brief pursuant to Anders v California, 386 U.S. 738, (1967) was filed in this matter on August 28, 2003. That brief was

denied and an order of the court for further briefing of this matter entered March 22, 2004.

A brief was then filed pursuant to the First Circuit Court of Appeals decision in U.S. v Melendez-Santana, 353 F3d 93, (2003) regarding the drug testing requirements of supervised release. On January 19, 2005 the First Circuit Court of Appeals entered its judgment which modified and affirmed Mr. Hernandez's sentence.

On January 12, 2005 this court handed down its decision in United States v. Booker; 125 S. Ct. 738; 160 L.Ed. 2d 621 striking the language which made the Federal Sentencing Guidelines mandatory.

Reason for Granting the Writ

Mr. Hernandez's petition for writ of certiorari should be granted in light of this court's ruling in U.S. v. Booker 125 S. Ct. 738 and the probability that he would have received a more favorable sentence under the advisory application of the Federal Sentencing Guidelines.

This court's recent decision in U.S. v. Booker struck certain language in the Federal Sentencing Guidelines ("Guidelines") which previously made the Guidelines mandatory for sentencing judges. 543 U.S. ___, 125 S. Ct. 738; 160 L. Ed. 2d 621. In Booker this court answered the question of whether its prior decisions in Blakely v. Washington and Apprendi v. New Jersey would be applicable to the federal Guidelines. Blakely v. Washington; 542 U.S. ___, 124 S. Ct. 2531. 159 L. Ed. 2d 403 (2004) and Apprendi v. New Jersey; 530 U.S. 466,120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In both cases this court held that provisions of state criminal sentencing statutes which allowed a judge to issue a sentence exceeding the maximum prescribed based on

factual determinations, other than a prior conviction, which had not been proven to a jury beyond a reasonable doubt, or admitted to in a guilty plea, violated a defendant's rights under the Sixth Amendment of the federal constitution. *Id.* While clearly holding the state provisions violated the Sixth Amendment, these cases deliberately left open the question of whether similar provisions in the Guidelines also violated the Sixth Amendment because the federal guidelines were not at issue at the time. Blakely, 124 S. Ct. at 2538 and Apprendi, 530 U.S. at 466, 120 S. Ct. at 2348. In Booker, the federal guidelines were at issue and this court determined that as written, they contained similar violations of the Sixth Amendment of the Federal Constitution. Booker; 125 S. Ct. at 756-757. Rather than completely invalidating the Guidelines as unconstitutional this court struck the offending provisions 18 U.S.C. § 3553(b)(1) which made the Guidelines mandatory and 18 U.S.C. § 3742(e) which depended on the mandatory nature of the guidelines, thus eliminating the portions of the Guidelines which offended the Sixth Amendment. *Id.* Consequently, the Guidelines are now advisory in nature, setting forth factors a judge should consider and suggesting sentencing ranges but giving a judge discretion in their exercise. *Id.* The ruling was applicable to all cases pending on direct review or not yet final. *Id* at 769. Reviewing courts are expected to apply ordinary prudential doctrines such as whether the issue was raised below and the plain-error test, or harmless error (where there has been no Sixth Amendment violation) in determining whether to remand a sentence for reconsideration or to review it for reasonableness. *Id.*

The First Circuit first addressed Booker in U.S. v. Antonakopoulos and has applied the plain-error doctrine where there has been a Booker error but it has not been preserved below.[3] 399 F.3d 68, 75 (1st Cir. 2005) citing

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[3] According to this circuit's interpretation of Booker, a Booker error has occurred where a sentencing court imposed its sentence under the previously mandatory Guidelines, although the issue may have been

Booker, 125 S. Ct. at 769 and the plain-error test as set forth in United States v. Olano, 507 U.S. 725, 731-732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Under Olano, the four prongs of the plain-error test are as follows:

1) that an error exists;
2) that the error was plain at the time of the appeal;
3) that the error affected the defendant's substantial rights;
4) the error would impair confidence in the justice of the proceedings. Antonakopoulos at 77 and Olano 507 U.S. at 732.

The First Circuit, in accordance with all other circuits, has determined that the first two prongs are met (if the issue was not preserved below) whenever a sentence has been imposed under the mandatory Guidelines system. Antonakopoulos at 77. It has also determined that application of this court's decision applying the third and fourth prongs of the plain error test to a *Rule 11* claim in United States v. Dominguez Benitez, 124 S. Ct. 2333, 159 L. Ed. 2d 157, 542 U.S. 74 (2004) is appropriate for Booker issues. In order to meet these other two prongs of the test, the First Circuit has determined that the defendant must point to circumstances creating a "reasonable probability" that the defendant would receive a more favorable sentence under the new advisory Guidelines. Antonakopoulos at 78.

The court then explains examples of situations where the test might be met, citing cases wherein there is evidence of aggravating or mitigating circumstances not available for consideration under the mandatory application of the Guidelines or where there is evident that the trial judge felt the Guidelines imposed unfair sentences or indicated he might otherwise have sentenced differently. Antonakopoulos

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preserved below with an argument of Sixth Amendment violations under Apprendi or Blakely. Antonakopoulos at 75.

at 81-82 and the cases cited therein. In this particular case, the defendant, Antonkopoulos failed to even raise such an issue but had sought a downward departure from his sentence based on special family circumstances and therefore permitted him the opportunity to file a supplement brief in accordance with the decision herein.

The facts in the case at bar are in exact accordance with the types of cases in which the First Circuit believes this court's ruling in Booker are meant to apply. The judgment of the United States District Court for the District of Massachusetts was handed down by a judge who imposed sentence under the former mandatory scheme of the Guidelines. Although the issue was not preserved below under an Apprendi or Blakely argument, this is sufficient to meet the first to prongs of the plain-error test as adopted and applied by the First Circuit to Booker claims in Antonakopoulos. Antonakopoulos at 77.

In addition, the petitioner in the case at bar can satisfy the remaining two prongs of the plain-error test; that the error affected the defendant's substantial rights and that the error would impair confidence in the justice of the proceedings; as there are facts in his case which indicate a "reasonable probability" that he would have received a more favorable sentence if the judge were not bound by the Guidelines. Antonakopoulos at 77 and Olano 507 U.S. at 732. The petitioner's case is very similar to those cited by the court in Antonakopoulos as those which should be reconsidered in light of Booker because the judge here has indicated that he felt the Guidelines often impose sentences that are too high and might have issued a lesser sentence but for their mandatory nature. Antonakopoulos at 81-82 and cases cited therein. Several times during the sentencing hearing, the sentencing judge, Judge Lasker expressed precisely that sentiment.

In response to counsel's argument that the petitioner will likely receive a higher sentence than Judge Lasker had imposed on the primary actors in the conspiracy as a result of his "career offender" classification under the Guidelines the judge admitted the likely result and said the following:

"...I think that some of the sentences proposed by the guidelines are much too high, but I do believe the principle that a repeat offender has to be treated with that in mind. That is one of the problems for me." ST page 12, lines 6-10.

And again, when handing down the sentence, after hearing the petitioner's common law wife describe their family circumstances and the petitioner himself speak of his passive role and the fact that he received no money from the conspiracy and would eventually be deported anyway, Judge Lasker said:

"...I've been thinking about it a long time, and I was glad to hear what your wife had to say, and I wish that I was entirely free to do what you're asking, but I am not entirely free just to say God bless you, you can go home. I'm bound by what they call sentencing guidelines, which say that I must sentence you within certain parameters" and then later references the particular issue of his career offender status as one of the problems. ST page 15, line 15 to page 16, line 12.

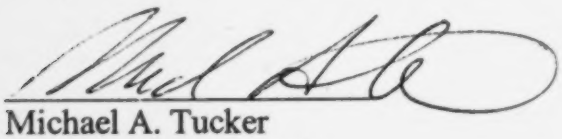
Therefore it certainly seems "reasonably probable" that this judge, given the freedom to consider some of the aggravating and mitigating circumstances and his disagreement with some of the formerly mandatory provisions of the Guidelines, that the petitioner would receive a more favorable sentence under the new advisory application of the Guidelines. The sentence imposed in the petitioner's case is exactly the type entitled to review in light of this court's ruling in Booker and the First Circuit's application thereof as applied in Antonakopoulos. The

petitioner therefore respectfully submits this petition for a writ of certiorari to the United States First Circuit Court of Appeals in order to obtain such review.

Conclusion

In light of the argument set forth above, this petition for a writ of certiorari should be granted.

Respectfully Submitted,



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